



ABRAHAM, FRUCHTER & TWERSKY, LLP

Brio is directed to file a responsive letter by September 13, 2024 at 9:00 AM. The Court will hold a REMOTE conference to resolve this dispute on September 13, 2024 at 3:30 PM ET. The parties shall dial 646-453-4442 and enter conference ID: 585 086 194 followed by #.

The Clerk of Court is directed to terminate the motion at Dkt. 209.

SO ORDERED.

September 11, 2024

Arun Subramanian, U.S.D.J.

Dated: September 12, 2024

By ECF

Hon. Arun Subramanian
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Courtroom 15A
New York, N.Y. 10007

Re: *Augenbaum v. Anson Inv. Master Fund, LP, et al.* Case No. 1:22-cv-0249 (AS)

Dear Judge Subramanian:

I am lead trial counsel for Plaintiff in this action and write, pursuant to Rule 5.E of Your Honor's Individual Practices in Civil Cases (the "Individual Rules"), to address certain existing discovery disputes Plaintiff is having with Defendants Brio Capital Master Fund LP and Brio Select Opportunities Fund, LP (collectively "Brio").

Plaintiff first addressed these issues in an August 26, 2024 email to Brio, a copy of which is attached hereto as Exhibit A. I conferred with John B. Horgan, is lead counsel for Brio, by telephone on Friday, September 6, 2024 at 11:30 a.m. and again on Tuesday, September 10, 2024 during a break in the deposition of Defendant M3A LP. Plaintiff and Brio have been unable to achieve agreement on the matters addressed in this letter and, therefore, Plaintiff requests that the Court either order Brio to produce the documents at issue or schedule an informal conference.

The first issue relates to the privilege log which Brio provided Plaintiff on August 23, 2024, designating as privileged information forwarded to and received from a third party identified as 436648161567@s.whatsapp.net Mozart ("Mozart"). See BRIO_007411-13 attached as Exhibit B. Brio's privilege log does not shed any additional light on the identity of that recipient. See Exhibit C at p.1. In Plaintiff and Brio's September 6th meet and confer Plaintiff understood Brio to state that the recipient was another fund manager with a common interest, which is supported by another WhatsApp string in which Mozart states "These [investment] conditions are very attractive. Should we increase the investment amount? 1 M ??? Or More?". BRIO_007414 attached as Exhibit D. Plaintiff stated that he disagreed with that and any similar privilege designation and that the parties had reached an impasse on that issue.

Plaintiff believes that the privilege designation fails *ab initio* because using a WhatsApp address to identify a recipient fails to satisfy the burden of establishing that the information is, in fact, privileged. Instead, Brio's privilege designation continues to obscure the identity of the recipient which itself is not privileged and must be disclosed as part of the privilege log. See, e.g., Individual Rules 5.G ("Privilege logs should be sufficiently detailed to enable the receiving party to evaluate a claim of privilege, including identification of attorneys involved in the relevant

Hon. Arun Subramanian

August 28, 2024

Page 2

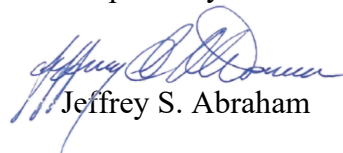
documents or communications.”) In addition, since Mozart appears to be a third party, the communication cannot be considered privileged because as this Court previously held “it is bedrock law that sharing otherwise privileged communications with a third party waives privilege.” Order 8/21/24 (ECF No. 203).

The second issue relates to Brio making a supplemental production of documents on August 23, 2024, including a document reflecting that Brio discussed its investment in Genius securities with its investors. *See* BRIO_007437 attached as Exhibit E. The existence of those communications with Brio’s investors is also confirmed by a designation in Brio’s privilege log provided the same day regarding “seeking attorney advice concerning investor communications.” *See* Ex. F at page 4 third entry. Plaintiff believes that Brio is obligated to produce such documents based upon the requests he originally served on defendants at the end of January. To avoid any doubt on the matter, Plaintiffs served a supplemental discovery request on August 30, 2024 specifically requesting such documents. In our discussions, Brio did not dispute the relevancy of the documents at issue and, indeed, identifying counsel’s advice with respect to investor communication as privileged acknowledges the relevancy of the information at issue.¹

In Plaintiff’s and Brio’s September 6th meet and confer, Brio took the position that investor communications were not called for by Plaintiff’s initial document request and that Brio’s response to the supplemental request was not due until September 30th. Plaintiff disagreed with Brio regarding the scope of the initial document request and stated that he would ask the Court to compel production of those documents in advance of Brio’s deposition currently scheduled for September 19th. Mr. Horgan asked for additional time until Tuesday, September 10, to confer with his client on this issue. As of this writing, and despite inquiring about the issue again during a break in a September 10th deposition, Plaintiff has not received any indication that Brio will produce those documents at all, let alone before its deposition.

Plaintiff requests that the Court order Brio to produce the documents at issue or, alternately, schedule an informal conference to address these issues.

Respectfully submitted,



Jeffrey S. Abraham

¹ Plaintiff also inquired from other Defendants in a September 4th meet and confer whether they have documents reflecting any communications with investors and was informed that any such documents would have been produced. Plaintiff is waiting confirmation from certain defendants with respect to whether such documents exist.

EXHIBIT A

Ryan Levy

From: Jeffrey S. Abraham
Sent: Monday, August 26, 2024 4:45 PM
To: John B. Horgan
Cc: Aldonsa V. Janjigian; Joanna Cohen; Michael Klein
Subject: RE: Augenbaum v. Anson Investments Master Fund LP et al., 1:22-cv-00249-AS

Dear John,

I write with respect to Brio's most recent production of documents made this past Friday, August 23rd right before 6:00 pm. Plaintiff notes that this production comes *after* the August 22nd date which Plaintiff initially noticed and *after* the requirement to substantively complete document production by the end of June. Plaintiff finds Brio's excuse about issues with a document vendor rather anemic since almost all the new documents produced appear to be from Shaye Hirsch's WhatsApp account.

Plaintiff also does not believe that the material redacted at BRIO_007411 consisting of Shaye Hirsch forwarding advice he received from a lawyer to a recipient identified as 436648161567@s.whatsapp.net Mozart is properly designated as privilege because that recipient appears to be a third party. Plaintiff also would appreciate some clarification with respect to Brio claiming with respect to communications had with your law firm because other Defendants including Anson are also claiming privilege with respect to communications with your law firm occurring within the same time frame. Thus, for example. Brio is claiming a privilege with respect to a 3/17/20 communication David Selengut for your firm and a 3/18/20 communication with Barbara Selengut of your firm (page 4 of Brio's privilege log) while Anson is claiming privilege with respect to a 3/13/20 communication with Robert Charron of your firm and a 3/16/20 GNUS EGS Invoice. Neither Brio nor Anson has produced any retention letter with your law firm seeking to waive any potential conflicts of interest.

In addition, one of the documents produced (BRIO_007437) together with the privilege log (the third entry on page 4) reflect that Brio's investment in Genius securities was discussed in communications with Brio's investors. Those communications are called for by Plaintiff's document requests including Request No.1 and, in any event, Brio by referencing the document as privileged acknowledges that those investor communications are relevant and called for Plaintiff's discovery request.

Finally, Plaintiff requests that Brio withdraw its objections to Plaintiff's Rule 30(b)(6) deposition served on August 23rd. Plaintiff on August 2nd noticed Brio's deposition for August 22nd and Brio refused to attend despite not having previously objected to the notice of deposition or seeking a protective order. This makes Brio subject for the sanctions provided for in Fed. R. Civ. P. 37(b)(2)(A) (*see* Fed. R. Civ. P. 37(d)(3)) and, therefore, further militate in favor Brio's objections being disregarded.

Please get back to me as soon as you can on these issues and please let me know whether you would like to meet and confer by telephone with respect to any of these issues and, if so, when you are available tomorrow or Wednesday.

Very truly yours,
Jeff Abraham

Jeffrey S. Abraham
Abraham, Fruchter & Twersky LLP
450 Seventh Avenue, 38th Floor
New York, NY 10123
Tel: (212) 279-5050
Fax: (212) 279-3655



From: Aldonsa V. Janjigian <ajanjigian@egsllp.com>
Sent: Friday, August 23, 2024 5:50 PM
To: Jeffrey S. Abraham <JAbraham@aftlaw.com>; Michael Klein <mklein@aftlaw.com>
Cc: John B. Horgan <jhorgan@egsllp.com>; Joanna Cohen <jcohen@egsllp.com>; VISO, Amella <Amella.Viso@freshfields.com>; William.Reckler@lw.com; Jeffrey.Geier@skadden.com; SCIARETTA, Shannon <Shannon.Sciaretta@freshfields.com>; Jared R. Clark <JClark@PhillipsNizer.com>; Richard Asche <richardasche@lagnyc.com>; Bratic, Catherine <catherine.bratic@hoganlovells.com>; GLADSTEIN, Andrew (ADGL) <Andrew.Gladstein@freshfields.com>; Iris.Xie@lw.com; Thomas.Allen@skadden.com; kieran.corcoran@stinson.com; Tracey, Dennis H. <dennis.tracey@hoganlovells.com>; Marc A. Landis <mlandis@phillipsnizer.com>; Daniel.Grill@lw.com; nicole.khalouian@stinson.com; Waywell, Tyler <tyler.waywell@hoganlovells.com>; NYC.LSSTeam@stinson.com; susan.saltzstein@skadden.com; Hemr, Kurt Wm. <Kurt.Hemr@skadden.com>; Christopher.Fredmonski@skadden.com
Subject: Augenbaum v. Anson Investments Master Fund LP et al., 1:22-cv-00249-AS

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

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Dear Counsel,

Please see the attached correspondence, as well as Defendants Brio Capital Master Fund Ltd. and Brio Select Opportunities Fund LP's supplemental production and privilege log in the link below. The password will be sent in a separate email.

<https://egsllp607.sharefile.com/public/share/web-s8d58ebb2a3654889bd471f155d4f7083>

If you have any trouble accessing the documents, please let me know.

Best,
Aldonsa



Aldonsa V. Janjigian

Associate

1345 Avenue of the Americas, 11th Fl., New York, NY 10105

Telephone: (212) 370-1300 Fax: (212) 370-7889

ajanjigian@egsllp.com | www.egsllp.com


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EXHIBIT B

9172735826@s.whatsapp.net Shaye Hirsch

August 22, 2019 12:37:28 PM

Attorney Client



9172735826@s.whatsapp.net Shaye Hirsch

August 22, 2019 5:24:29 PM

<https://variety.com/2019/tv/news/hasbro-acquires-entertainment-one-in-4-billion-all-cash-deal-1203311068/>



Toymak_1

Attachment Note:

Toymaker Hasbro is acquiring studio Entertainment One in an all-cash transaction valued at \$4 billion, bringing My Little Pony and Nerf under the same umbrella as "Peppa Pig" and "..."

9172735826@s.whatsapp.net Shaye Hirsch

August 22, 2019 5:24:54 PM

I asked Andy if this validates genius story

9172735826@s.whatsapp.net Shaye Hirsch

August 22, 2019 5:25:05 PM

Entertainment One. Correct. They have Peppa Pig. One hit drives monster valuations. We know the Hasbro people well and forever. I literally just got off the phone with our head of consumer product licensing, Lloyd Mintz and asked him to set up a meeting for us with Hasbro. He previously ran all licensing for Hasbro and has amazing relations there as well. I had no knowledge of this transaction at the time, but I think they are worth talking to because of their dominance of the superhero marketplace with their marvel license. However they don't have anything in preschool superheroes. In either case they are just one of many players out there who are part of the food chain that we will eventually be feeding into. Yes it validates our premise. Successful kids content is very in demand

9172735826@s.whatsapp.net Shaye Hirsch

August 22, 2019 5:30:06 PM

Have a call with Andy tomorrow. I think it's important to clean up the cap structure (warrants and preferred) as part of any plan of new \$

436648161567@s.whatsapp.net Mozart

August 22, 2019 7:41:57 PM

Attorney Client Privilege




EXHIBIT C

Brio Privilege Log

Bates Number	Document Type	Filename	Family Date	Email From	Email To	Subject	Privilege Note
	Email	144 Legal Opinion Request for GNUS.msg	7/22/2019 2:11 PM	Marina Gorecki <marina@briocapital.com>	Barbara Mittman <barbara@grushkomittman.com>;Grushko & Mittman <counslers@gmail.com>;counslers@aol.com;Shaye Hirsch <shaye@briocapital.com>;Irene Kupferman <irene.k@briocapital.com>	144 Legal Opinion Request for GNUS	Attorney client communications regarding 144 legal opinion.
	Pdf	GNUS--Book-EntryStatement--011018.pdf	7/22/2019 2:11 PM				
	Pdf	GNUS--Seller's Rep Letter--072219.pdf	7/22/2019 2:11 PM				
	Pdf	GNUS--CompleteSPA.PDF	7/22/2019 2:11 PM				
	Pdf	GNUS--ProofOfPurchase--010918.pdf	7/22/2019 2:11 PM				
	Pdf	GNUS 2018 WT.PDF	7/22/2019 2:11 PM				
	Email	RE 144 Legal Opinion Request for GNUS.msg	7/22/2019 2:47 PM	Marina Gorecki <marina@briocapital.com>	Barbara Mittman <barbara@grushkomittman.com>	RE: 144 Legal Opinion Request for GNUS	Attorney client communications regarding 144 legal opinion.
	Email	Re 144 Legal Opinion Request for GNUS.msg	7/22/2019 2:51 PM	Barbara Mittman <barbara@grushkomittman.com>	Marina Gorecki <marina@briocapital.com>	Re: 144 Legal Opinion Request for GNUS	Attorney client communications regarding 144 legal opinion.
	Email	RE 144 Legal Opinion Request for GNUS (Broker Letter).msg	7/22/2019 4:30 PM	Shaye Hirsch <shaye@briocapital.com>	Grushko Mittman' <Counslers@grushkomittman.com>;marina@briocapital.com;irene.k@briocapital.com;'Barbara Mittman' <barbara@grushkomittman.com>	RE: 144 Legal Opinion Request for GNUS (Broker Letter)	Attorney client communications regarding 144 legal opinion.
BRIO_007410-BRIO_007413	Pdf	0002568.pdf	8/22/2019 12:36 PM	9172735826@s.whatsapp.net Shaye Hirsch;436648161567@s.whatsapp.net Mozart	436648161567@s.whatsapp.net Mozart		Communication containing and discussing attorney advice related to potential transaction.
	Email	RE Hello! (Andy HeywardGenius Brands).msg	8/26/2019 11:26 AM	David Selengut <selengut@egsllp.com>	Shaye Hirsch' <shaye@briocapital.com>	RE: Hello! (Andy Heyward/Genius Brands)	Attorney client communication containing attorney advice about Genius proposal.
	Email	RE term sheet-confidential.msg	8/27/2019 4:34 PM	David Selengut <selengut@egsllp.com>	Shaye Hirsch' <shaye@briocapital.com>	RE: term sheet-confidential	Attorney client communication containing attorney advice about Genius deal terms.
	Email	FW term sheet-confidential.msg	8/28/2019 10:11 AM	David Selengut <selengut@egsllp.com>	Shaye Hirsch' <shaye@briocapital.com>;Robert F. Charron <rcharron@egsllp.com>	FW: term sheet-confidential	Attorney client communication containing attorney advice about Genius deal terms.
	Email	RE term sheet-confidential.msg	8/28/2019 10:43 AM	Robert F. Charron <rcharron@egsllp.com>	David Selengut <selengut@egsllp.com>;'Shaye Hirsch' <shaye@briocapital.com>	RE: term sheet-confidential	Attorney client communication containing attorney advice about Genius deal terms.
	Email	RE term sheet-confidential.msg	9/8/2019 2:39 PM	Robert F. Charron <rcharron@egsllp.com>	Shaye Hirsch <shaye@briocapital.com>;David Selengut <selengut@egsllp.com>	RE: term sheet-confidential	Attorney client communication containing attorney advice about Genius deal terms.
	Email	RE term sheet-confidential.msg	9/9/2019 1:59 PM	Robert F. Charron <rcharron@egsllp.com>	Shaye Hirsch <shaye@briocapital.com>;David Selengut <selengut@egsllp.com>	RE: term sheet-confidential	Attorney client communication containing attorney advice about Genius deal terms.
	Email	RE term sheet-confidential.msg	9/9/2019 2:49 PM	Robert F. Charron <rcharron@egsllp.com>	Shaye Hirsch <shaye@briocapital.com>;David Selengut <selengut@egsllp.com>	RE: term sheet-confidential	Attorney client communication containing attorney advice about Genius deal terms.

EXHIBIT D

Number of participants	2
Participants	436648161567@s.whatsapp.net Mozart 9172735826@s.whatsapp.net Shaye Hirsch
Number of messages	7
First message sent date/time	September 19, 2019 5:42:27 AM
Last message sent date/time	September 19, 2019 10:29:48 PM

436648161567@s.whatsapp.net Mozart

September 19, 2019 5:42:27 AM

Dear Shaye,

I see your negotiating skills in great shape 😊

436648161567@s.whatsapp.net Mozart

September 19, 2019 5:43:26 AM

Asa you have more or less final documents could you pls send them to Michael Walther.

436648161567@s.whatsapp.net Mozart

September 19, 2019 5:44:51 AM

These conditions are very attractive. Should we increase the investment amount? 1 M ???

436648161567@s.whatsapp.net Mozart

September 19, 2019 5:45:06 AM

Or more?

9172735826@s.whatsapp.net Shaye Hirsch

September 19, 2019 7:58:37 AM

More would definitely be better for the company, but I can't do more fire the fund now... 750 is honestly stretching it as it is (together with the other gnus)positions

9172735826@s.whatsapp.net Shaye Hirsch

September 19, 2019 7:59:10 AM

Also, don't know if Andy would be able to do more now- maybe ask him?

EXHIBIT E

9172735826@s.whatsapp.net Shaye Hirsch

July 02, 2020 1:16:30 PM

No

9172735826@s.whatsapp.net Shaye Hirsch

July 02, 2020 1:16:36 PM

I'm fine with Monday

9172735826@s.whatsapp.net Shaye Hirsch

July 02, 2020 1:16:58 PM

Want to try to put together an investor letter over the weekend

9175694824@s.whatsapp.net Benjamin
Herskovich

July 02, 2020 1:17:16 PM

Ok lmk when valuations r done

9172735826@s.whatsapp.net Shaye Hirsch

July 02, 2020 1:17:20 PM

NEW YORK: NO CAMP: A judge denied a request to overrule Gov. Cuomo and allow sleepaway camps to open this summer. A hearing will only take place after the summer ends.

9175694824@s.whatsapp.net Benjamin
Herskovich

July 02, 2020 1:17:46 PM

What is effy doing?

EXHIBIT F

Brio Privilege Log

	Email	ACCEPTED FORM TYPE SC 13G A (0001213900-20-002517).msg	2/4/2020 1:12 PM	edgar-postmaster@sec.gov	EdgarAgents <filings@edgaragents.com>	ACCEPTED FORM TYPE SC 13G/A (0001213900-20-002517)	
	Email	valuation - 3.msg	2/26/2020 9:10 PM	Shaye Hirsch <shaye@briocapital.com>	David Selengut (selengut@egsllp.com);Ben Herskovich (bherskovich@gmail.com)	valuation - 3	
	Pdf	WarrantValuationDetail-123119.pdf	2/26/2020 9:10 PM				
	Email	Brio Select.msg	3/17/2020 1:57 PM	Shaye Hirsch <shaye@briocapital.com>	Shaye Hirsch (shaye@briocapital.com);David Selengut (selengut@egsllp.com);'Barbara Warren' <bwarren@egsllp.com>;'Marina Gorecki' <marina@briocapital.com>;Shaye Hirsch <shaye@briocapital.com>;David Selengut <selengut@egsllp.com>	Brio Select	Attorney Client Communication seeking attorney advice concerning investor communications.
	Pdf	Hirsh, Shaye-Brio Select Opportunities Fund-Series A Subscription Agreement-Fully Executed-031220.pdf	3/17/2020 1:57 PM				
	Email	RE Brio Select.msg	3/18/2020 3:17 PM	Barbara Warren <bwarren@egsllp.com>	Shaye Hirsch' <shaye@briocapital.com>	RE: Brio Select	Attorney Client Communication containing attorney advice related to SEC filings.
	Email	GNUS.msg	3/23/2020 9:29 AM	Shaye Hirsch <shaye@briocapital.com>	David Selengut (selengut@egsllp.com)	GNUS	Attorney Client Communication seeking attorney advice related to SEC filings.
	Email	RE GNUS.msg	3/23/2020 9:40 AM	David Selengut <selengut@egsllp.com>	Shaye Hirsch' <shaye@briocapital.com>	RE: GNUS	Attorney Client Communication seeking attorney advice related to SEC filings.
	Email	RE Good Morning!.msg	3/23/2020 12:05 PM	Eddie Peña <epena@egsllp.com>	David Selengut <selengut@egsllp.com>;'Shaye Hirsch' <shaye@briocapital.com>	RE: Good Morning!	Attorney Client Communication containing attorney advice related to SEC filings.
	Word	SC 13G Amend. No. 4 (Feb 2020) - Genius Brands International, Inc. (00763918-2xA9C08).docx	3/23/2020 12:05 PM				
	Email	SC 13G Amend. No. 5 - Genius Brands International, Inc. .msg	3/25/2020 12:08 PM	Eddie Peña <epena@egsllp.com>	Shaye Hirsch' <shaye@briocapital.com>;David Selengut <selengut@egsllp.com>	SC 13G Amend. No. 5 - Genius Brands International, Inc.	Attorney Client Communication containing attorney advice related to SEC filings.
	Word	SC 13G Amend. No. 5 (March 2020) - Genius Brands International, Inc. (00763918-4xA9C08).docx	3/25/2020 12:08 PM				
	Email	RE SC 13G Amend. No. 5 - Genius Brands International, Inc. .msg	3/25/2020 12:30 PM	Shaye Hirsch <shaye@briocapital.com>	Eddie Peña' <epena@egsllp.com>;'David Selengut' <selengut@egsllp.com>;'Marina Gorecki' <marina@briocapital.com>	RE: SC 13G Amend. No. 5 - Genius Brands International, Inc.	Attorney Client Communication seeking attorney advice related to SEC filings.